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# Be the expert you are

## Invited commentary on … The psychiatrist as expert witness, Parts 1 and 2[†]

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**Abstract** Recent highly publicised events have understandably worried some expert witnesses, including psychiatrists. This commentary seeks to encourage those who have invaluable expertise to offer the courts to continue to act as expert witnesses. The Civil Procedure Rules and the Criminal Procedure Rules are helpful to some extent in allaying any fears that expert psychiatrists may have. They are, however, matters of form. More important, it is suggested, are the principles that operate and that, at least in part, lie behind the Rules. Those principles are often, in fact, not unfamiliar ones. Moreover, some of the most fundamental legal principles applied in the courts operate to circumscribe the role of expert witnesses, thus protecting them, provided that they do not go beyond the limits of their expertise.

Dr Rix refers in the first of his two articles (Rix, 2008*a*) to the shock waves caused by the events surrounding Professor Sir Roy Meadow. (He might have added the equally disturbing events surrounding another paediatrician, Dr David Southall, who was struck off the medical register.) Meadow was a prosecution expert in two very high-profile miscarriages of justice: the Sally Clarke case and the Angela Cannings case. It was these two cases more than any other which led to the criticisms of him and ultimately to the case of *Meadow v. General Medical Council* [2007] referred to by Dr Rix. The frisson of fear engendered by these cases is palpable. There is a risk that some experts become more defensive, watering down perfectly legitimate opinions. There is even a risk that some experts refuse to continue to act as expert witnesses at all. Both of these cases were hard cases. There is an adage oft-quoted in legal circles: hard cases make bad law. Perhaps bad cases can have an even wider deleterious effect.

Although the Civil Procedure Rules referred to in Dr Rix's first article are a helpful backdrop to the more recent Criminal Procedure Rules, it is in criminal cases that the issues come most dramatically to a head. It is therefore sensible to focus on the criminal field in this response to his articles (Rix, 2008*a*,*b*). The Criminal Procedure Rules do provide important guidance and even, perhaps, some protection to the expert witness. So too, doubtless, will the report of College's Scoping Group on Court Work (Royal College of Psychiatrists, 2008), also referred to by Dr Rix. However, it is in understanding the principles which operate in the criminal justice system and which, to some extent, lie behind the Rules that the greatest assistance, and indeed the greatest protection, can be found.

[†]See vol. 14, issue 1, pp. 37–41 and this issue, pp. 109–114 and 115–118.

## It really isn't that different

The role of the expert in the forensic field is not so very different from the role of the expert more generally. In normal practice, psychiatrists, for example, operate within professional rules, protocols and most importantly principles. Within that general framework, they exercise the most important commodity possessed by any professional: informed and experienced judgement. It is just the same in the forensic field. Of course, experts giving evidence must not go beyond the bounds of their particular expertise and must not claim more for the expertise they does possess than is justified by it. But is this not exactly the same as what is required for normal professional practice? It was Meadow's failure to adhere to this important principle that led to the most severe and abiding criticism levelled at him. He had incorporated into his opinions statistical assertions which he was not qualified to make, and which turned out to be ill-founded. It may be that this was simply careless. It may be that it was tendentious: seeking to argue the case. Courts are particularly leery of tendentiousness because at best it trespasses

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onto the jury's sole territory (see below); at worst it might even create a suspicion of bias. But again, is tendentiousness not something all professionals realise they must generally guard against?

## The fact-finding role of the jury is sacrosanct

The very first direction of law given to almost every jury in a criminal trial is that they are the judges of the facts and issues and that the professional judge him- or herself has no such fact-finding role. In practice, it is given to them at the beginning of the trial, and it is given to them again at the beginning of the judge's summing up at the end of the trial.

This fundamental principle lies behind many subordinate principles of law. One such is that witnesses are generally not permitted to express opinions; they are permitted only to give evidence of what they themselves heard, saw or otherwise perceived. Expert opinion evidence is an exception. Only if the members of a jury could not themselves form conclusions on an issue without the benefit of an expert, is expert opinion evidence permitted. The expertise justifies its own admission into evidence. The leading case on the dividing line between impermissible opinion evidence on the one hand, and permissible expert opinion evidence on the other hand, is *R v. Turner* [1975]. The accused's lawyers had sought to call psychiatric evidence as to, among other issues, an opinion that the accused's mental state was such that he was likely to be telling the truth. Whether a witness is telling the truth or not is quintessentially a matter for the jury. Not surprisingly, therefore, it was held by the Court of Appeal that such expert opinion was inadmissible. Had the issue been whether the accused's mental state amounted to an abnormality of mind within the meaning of section 2 of the Homicide Act 1957, it would have been properly admitted. It would then have a matter lying outside the jury's normal range of knowledge but within that of the expert psychiatrist.

Historically, the sacrosanct role of the jury also lay behind a rule of law that an expert was forbidden from expressing an opinion on what was usually described as 'the ultimate issue'. This prohibition was honoured more in the breach than in the observance, and for good reason. The opinion of the expert often cannot be separated neatly out from the ultimate issue any more than ice can be separated from snow. It finally fell by the wayside in a case called *R v. Stockwell* [1993]. Lord Taylor CJ said:

> 'The same view is expressed by Tristram and Hodkinson in their work on *Expert Evidence Law and Practice* at pages 152 to 153, where, after referring to the case of Wright they say that in that case the expert witness could not express an opinion as to whether the particular facts before the court constituted an act of insanity. He could, however, state what types of behaviour demonstrated insanity in persons generally, from which the jury could draw inferences in the particular case. The learned authors went on as follows:
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> "There is little doubt however that such a distinction is not now rigorously observed, and given that expert evidence of this kind is to be put before a jury, it may be suspected that the often casuistic distinction between the general and the particular is either ignored by juries, or seen as a distinction of form rather than substance. It has been suggested too that some defences in criminal proceedings can in effect only be raised by adducing expert evidence, and that: 'it would put an insuperable difficulty in the way of insanity' if such evidence were to be excluded by an ultimate issue or other analogous rule."
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> The rationale behind the supposed prohibition is that the expert should not usurp the functions of the jury. But since counsel can bring the witness so close to opining on the ultimate issue that the inference as to his view is obvious, the rule can only be, as the authors of the last work referred to say, a matter of form rather than substance.
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> In our view an expert is called to give his opinion and he should be allowed to do so. It is, however, important that the judge should make clear to the jury that they are not bound by the expert's opinion, and that the issue is for them to decide.'

The case identifies one of the areas in which the ultimate issue problem created difficulties for psychiatrists: insanity. More importantly, although this development might be thought to have put more responsibility on the expert who is now able to give an opinion as to the ultimate issue, the approach outlined in the case none the less shows the continued importance of the fundamental principle that it is the jury that retains the sole final responsibility. Whenever an expert has given evidence in a criminal trial, the jury is directed by the judge, following this case, that they do not have to accept the evidence of the expert since it is their decision, not that of the expert, on which the case rests.

## The roles of the other party and the judge

In the Meadow case itself, Lord Justice Auld said:

> 'In criminal or civil proceedings, it is for the parties' legal representatives and ultimately the judge, to identify before and at trial what evidence, lay or expert, is admissible and what is not. In the case of expert evidence, involving, as it often does, opinion evidence … it is critical that the legal representatives of the party proposing to rely on such evidence should ensure that the witness's written and oral evidence is



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> confined to his expertise and is relevant and admissible to the important issues in the case on which he has been asked to assist. Equally, it is incumbent on the legal representatives on the other side not to encourage, in the form of cross-examination or otherwise, an expert to give opinion evidence which is irrelevant to those issues and/or outside his expertise, and, therefore, inadmissible. And, throughout, it is for the judge, as the final arbiter of relevance and admissibility, to ensure that an expert is assisted or encouraged to keep within the limits of his expertise and does so relevantly to the issues in the case on which he is there to assist' (para. 206).

The criminal – and for that matter the civil – trial process is adversarial. Dr Rix correctly points out (2008*b*) that the court can direct that only one expert gives evidence on behalf of a number of accused persons. This is an example of financial expediency. The Rules are not always founded on principle. However, it is noteworthy that there is no provision in the Criminal Procedure Rules for the court to order that only one expert should be instructed on behalf of an accused and the prosecution. This would undermine the fundamentally adversarial nature of criminal proceedings, and it would put too much emphasis on the opinion of a single expert. It would, in other words, run the risk of trial by expert. Although, as referred to above, experts must know their limitations and not exceed them, their evidence will additionally be subjected to the careful and critical scrutiny of the opposing party and the trial judge. The ultimate responsibility for ensuring the fairness of the trial process rests with the judge.

## Conclusions

There is a world of difference between learning lessons from what happened in cases such as Meadow and, even more strikingly, Southall on the one hand, and being paralysed from continuing to act as an expert, or being petrified into acting defensively, on the other. Experts continue to be invaluable to the criminal process. The Criminal Procedure Rules, as commendably summarised by Dr Rix, do provide some help to an expert by making it necessary to advert to important principles of competency, objectivity, transparency and so on. But it is the principles themselves that are most important and that provide the most important protection for an honest, suitably qualified and fair expert. Although this short response cannot hope to demonstrate, or even illustrate, those principles fully, it is hoped that it at least puts onto the agenda of any psychiatrist considering whether or not to act as an expert witness that the principles that operate in the criminal justice system are less unfamiliar than they might think, and operate so as properly to limit and circumscribe the responsibility which experts carry. Experts are giving evidence in criminal trials all the time. Cases such as Meadow and Southall are, in part, so shocking because of how very exceptional they are. It would be a mistake to base a proper approach to the issue of whether to be, and how to be, an expert witness on these exceptional cases.

## Declaration of interest

None.

## References

Rix, K. J. B. (2008*a*) The psychiatrist as expert witness. Part 1: general principles and civil cases. *Advances in Psychiatric Treatment*, **14**, 37–41.

Rix, K. J. B. (2008*b*) The psychiatrist as expert witness. Part 2: criminal cases and the Royal College of Psychiatrists' guidance. *Advances in Psychiatric Treatment*, **14**, 109–114.

Royal College of Psychiatrists (2008) Court Work (College Report CR147). Royal College of Psychiatrists.

*Meadow v. General Medical Council* [2007] QB 462.

*R v. Stockwell* [1993] 97 Cr App R260.

*R v. Turner* [1975] QB 834.



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